

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RICKEY JONES,)	
)	
Petitioner,)	
)	
v.)	No. 4:06 CV 402 ERW
)	DDN
ALAN BLAKE,)	
)	
Respondent.)	

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the court upon the petition of Rickey Jones for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was assigned to the undersigned United States Magistrate Judge for review and a recommended disposition under 28 U.S.C. § 636(b). For the reasons set forth below, the undersigned recommends that the petition be denied.

I. BACKGROUND

Petitioner Rickey Jones is confined at the Missouri Sex Offender Treatment Center (MSOTC) in Farmington, Missouri. (Doc. 2 at 1.) In October 1993, petitioner pled guilty to three counts of sodomy and was sentenced to ten years imprisonment at the Missouri Department of Corrections. (Doc. 10, Ex. E at 2.) On October 22, 2002, five days before petitioner's scheduled release, the State initiated proceedings to have him involuntarily committed to the Department of Mental Health as a sexually violent predator, pursuant to the Missouri Sexually Violent Predator Act (SVPA), Mo. Rev. Stat. § 632.480, et seq. (Id.) Petitioner opposed the civil commitment, and proceeded to trial. After a jury verdict, he was committed to the custody of the director of the Department of Mental Health by judgment of the Probate Division of the Circuit Court of St. Louis City, and civilly confined at MSOTC. (Id.) Petitioner filed an appeal from the commitment order with the Missouri Court of Appeals, which was denied. (Doc. 10, Ex. E); Jones v. State, 157 S.W.3d 236 (Mo. Ct. App. 2004) (per curiam). His petition for habeas corpus follows that court's decision.

Petitioner alleges that he is unlawfully confined at MSOTC for three reasons. In his original petition, Jones first argues that he is confined in violation of his due process and equal protection rights, and that even if the commitment satisfied due process and equal protection standards, insufficient evidence was presented for any reasonable fact-finder to determine that he is a sexually violent predator. (Doc. 2 at 6.) Second, Jones argues that he is entitled to specific performance of his plea agreement and that his confinement is an unwarranted and unlawful collateral consequence of his plea bargain agreement in his earlier criminal case. (Id. at 7.) Finally, in his amended petition, Jones argues that the trial court deprived him of his constitutional rights by submitting an improper instruction to the jury. (Doc. 16 at 6-7.)

In response to petitioner's first ground, respondent first claims that federal habeas relief is not available in civil commitment cases. (Doc. 9 at 2.) Respondent next argues that petitioner has failed to present these issues on state appeal, resulting in a procedural bar to federal habeas relief, and petitioner does not demonstrate cause or prejudice to overcome the procedural bar. (Id.) Finally, respondent asserts that the petition fails on the merits because sufficient evidence was presented to the jury to support petitioner's commitment. (Id. at 3.) In response to petitioner's second ground, respondent presents two arguments. Respondent first asserts that petitioner is not "in custody" as required by § 2254. (Id. at 4.) Respondent argues, in the alternative, that even if petitioner is "in custody," the petition should be denied because petitioner has failed to exhaust his state remedies. (Id.) Finally, respondent argues that the claims in the amended petition are untimely. (Doc. 18 at 1-2.)

II. DISCUSSION

Habeas Review of Civil Commitment Proceedings

Respondent argues that federal habeas courts are barred from reviewing civil commitment proceedings. The Supreme Court has stated that habeas review may be available to challenge a state court order of civil commitment even though the order was not the result of an actual

criminal conviction. Duncan v. Walker, 533 U.S. 167, 176 (2001). Courts have regularly reviewed civil commitment proceedings relating to the involuntary commitment of sexual offenders pursuant to state statutes. See Poole v. Goodno, 335 F.3d 705, 706, 710 (8th Cir. 2003) (reviewing a habeas petition following a civil commitment order under the Minnesota Sexual Psychopathic Personality and Sexually Dangerous Person Acts); Linehan v. Milczark, 315 F.3d 920, 921 (8th Cir. 2003) (same). Indeed, this court has applied the law of habeas corpus to a petitioner challenging a civil commitment under the SVPA. Fogle v. Blake, 4:06 CV 900 RWS (AGF), 2006 WL 3469613, at *2 (E.D. Mo. Nov. 29, 2006), adopted by, 2006 WL 3792627 (E.D. Mo. Dec. 20, 2006) (dismissing habeas petition, without prejudice, for failure to exhaust state remedies). Respondent's argument concerning habeas review of civil proceedings is incorrect.

"In Custody" Requirement

A district court may entertain a habeas petition only if the petitioner is in custody pursuant to the judgment of a state court. 28 U.S.C. § 2254(a). Generally, the determination of whether a petitioner is "in custody" depends on whether petitioner's freedom of liberty is restrained, and whether his freedom of movement rests in the hands of state officers. See Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973). The Eighth Circuit has held there must be a significant restraint of one's liberty for a petitioner to meet the "in custody" requirement. Russell v. City of Pierre, State of S.D., 530 F.2d 791, 792 (8th Cir. 1976) (per curiam). Involuntary civil commitment has been held to be a sufficient restraint of liberty to be in custody for § 2254 purposes. See Duncan, 533 U.S. at 176; Brock v. Weston, 31 F.3d 887, 890 (9th Cir. 1994); Lewis v. Del. State Hosp., 490 F. Supp. 177, 180 (D. Del. 1980). Further, the "in custody" requirement is satisfied only if the petitioner was in custody at the time of the filing of the habeas petition. Lopez v. Heinauer, 332 F.3d 507, 510 (8th Cir. 2003).

Although respondent asserts that petitioner is not in custody as required by § 2254(a), it is clear that he is. Petitioner's freedom of movement is restrained pursuant to a state court judgment. This is exactly the type of confinement which renders the petitioner "in

custody." See Duncan, 533 U.S. at 176. Since petitioner is in custody, and he filed his habeas petition while in custody, the § 2254(a) requirement is met.

Exhaustion of State Remedies and Procedural Bar

The doctrine of procedural bar dictates that a federal habeas court cannot review a claim that the state trial and appellate courts did not address because the petitioner failed to meet the reasonable procedural requirements of the state for presenting the claim. Lee v. Kemna, 534 U.S. 362, 375 (2002). Petitioner must present the state courts with the same claim he urges upon the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971). Failure to properly raise a claim in the state courts erects a procedural bar to relief in federal court. Sweet v. Delo, 125 F.3d 1144, 1149-50 (8th Cir. 1997). The doctrine of procedural bar applies whether the default occurred at trial, on appeal, or during state collateral attack. See Murray v. Carrier, 477 U.S. 478, 490-92 (1986).

Petitioner has not urged the same claims upon this court as he did the state courts. On his state court appeal of the commitment order, petitioner argued the sole claim of trial error relating to a jury instruction. Petitioner never asserted a claim of insufficient evidence or demanded specific performance of his plea agreement on appeal.¹ Since petitioner failed to present this federal habeas court with the same claims presented to the state court, he has not properly exhausted the state remedies available to him, and the procedural bar to habeas review is raised on the two claims in his original petition.

Petitioner may avoid the procedural bar to federal habeas review if he can demonstrate legally sufficient cause for the default and actual prejudice resulting from it, or if he can demonstrate that failure to review the claim would result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991). To establish cause for a procedural default, petitioner must demonstrate that some objective

¹In fact, in the memorandum affirming the lower court's judgment, the Missouri Court of Appeals specifically noted that "Jones does not challenge the sufficiency of the evidence to support the jury's finding that he is a sexually violent predator." (Doc. 10, Ex. E at 2 n.1.)

factor external to the defense impeded his efforts to comply with state procedural requirements. Id. at 750-52. A lack of education or legal training, illiteracy, physical or mental handicap and pro se status on the part of petitioner are not legally sufficient causes for procedural default. Cornman v. Armontrout, 959 F.2d 727, 729 (8th Cir. 1992). There is no evidence on the record which indicates that petitioner's failure to raise these claims resulted from any objective factor external to his defense. Therefore, there exists no cause for any alleged procedural default.

Petitioner may also avoid the procedural bar by demonstrating that the failure to consider the grounds will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 735; Griffini v. Mitchell, 31 F.3d 690, 692 (8th Cir. 1994). A fundamental miscarriage of justice can be demonstrated only if it is shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent" Murray, 477 U.S. at 496. A claim of insufficient evidence to convict under state law is not a claim of actual innocence. Andrews v. Norris, 108 F.3d 163, 164 (8th Cir. 1997). A habeas petitioner asserting actual innocence must do so with new, reliable evidence that was not presented at trial. Johnson v. Norris, 170 F.3d 816, 817-18 (8th Cir. 1999). Petitioner neither asserts actual innocence nor presents this court with new, reliable evidence that was not presented at trial. This petition, therefore, is procedurally barred.

Nevertheless, Congress has provided that a federal habeas court may deny habeas relief on the merits of the petition, notwithstanding the failure of petitioner to exhaust available state remedies. See 28 U.S.C. § 2254(b)(2).

Standard of Review

Habeas relief may not be granted by a federal court on a claim that has been decided on the merits in state court unless that adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1)-(2). "A state court's decision is contrary to clearly established law if the controlling case law requires a different outcome either because of factual similarity to the state case or because general federal rules require a particular result in a particular case." Tokar v. Bowersox, 198 F.3d 1039, 1045 (8th Cir. 1999). The issue a federal habeas court faces when deciding whether a state court unreasonably applied federal law is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000) (plurality opinion). A state court's factual findings are presumed to be correct. 28 U.S.C. § 2254(e)(1); Whitehead v. Dormire, 340 F.3d 532, 536 (8th Cir. 2003). Clear and convincing evidence that factual findings lack evidentiary support is required to grant habeas relief. Whitehead, 340 F.3d at 536.

Due Process and Insufficiency of Evidence

Petitioner first argues that his confinement, pursuant to the Missouri involuntary civil commitment statute, violates due process. Petitioner then argues that even if the state statute satisfies due process requirements, there existed insufficient evidence for any reasonable fact-finder to determine that he is a sexually violent predator within the meaning of the SVPA. The Supreme Court decision in Addington v. Texas, 441 U.S. 418 (1979), provides guidance as to what due process requires of a state civil commitment statute. In Addington, the Supreme Court held that due process requires the state civil commitment statute to require proof by a standard greater than the preponderance of the evidence standard found in other categories of civil cases. Id. at 432-33. In particular, the Court held that proof equal to or greater than the "clear and convincing evidence" standard would govern civil commitment proceedings. Id. Given the uncertainties of psychiatric diagnosis, the Court found a reasonable doubt standard inappropriate. Id.

Civil commitment statutes implicate other due process considerations. Civil commitment statutes survive due process analysis if they also require both proof of dangerousness, and proof of some "mental abnormality" or "mental illness." Kansas v. Hendricks, 521 U.S. 346, 358 (1997). In sum, for the SVPA to meet due process standards, it must require, at a minimum, a finding by clear and convincing evidence that the individual subject to commitment is dangerous and suffers from a mental illness or abnormality.

The SVPA explicitly requires that the "court or jury shall determine whether, by clear and convincing evidence, the person is a sexually violent predator." Mo. Rev. Stat. § 632.495 (emphasis added). In the instant case, the jury was charged with finding beyond a reasonable doubt that petitioner was a sexually violent predator as defined by the statute. (Doc. 10, Ex. A at 475-76.) The standard of "beyond a reasonable doubt" is more demanding than the requisite "clear and convincing" evidentiary standard. See Addington, 441 U.S. at 432-33. So, the jury's finding passes muster in that respect. The SVPA defines a "sexually violent predator" as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence" Mo. Rev. Stat. § 632.480(5). The language of the statute satisfies both the requirement of dangerousness and mental illness or abnormality, as required by Hendricks. On its face, the Missouri statute meets due process requirements, and is therefore valid. See Bonine v. Blake, No. 4:05 CV 811 CAS, 2005 WL 2122066, at *2 (E.D. Mo. Sept. 1, 2005) (noting the Missouri Supreme Court has found the SVPA constitutional).

When a federal habeas court is reviewing the merits of a state court conviction in the context of a claim of insufficient evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). After reviewing the record, it is clear that the jury had sufficient proof to find, beyond a reasonable doubt, that the petitioner was a sexually violent predator under the SVPA.

During the trial, the jury heard graphic testimony from some of the petitioner's victims regarding his prior crimes. (Doc. 10, Ex. A at 270-82.) The state's attorney also presented expert testimony that petitioner suffers from pedophilia and has a sexual attraction to young children. (Id. at 360-61.) The same expert also testified that, in his expert opinion, the petitioner met the definition of a sexually violent predator within the bounds of the SVPA. (Id. at 365.) Throughout the trial, the jury heard evidence from experts that petitioner had an extensive record of arrests, dating back to when he was a juvenile, relating to the sexual abuse of young children. (Id. at 312-14, 368-370.) Further, there was expert testimony that the petitioner was unwilling to undergo treatment for his mental illness while incarcerated pursuant to the plea agreement. (Id. at 304-09.) Given the nature of the testimony presented to the jury, it is clear that a rational person could have found, beyond a reasonable doubt, that petitioner was mentally ill and dangerous, and therefore a sexually violent predator under the SVPA.

Specific Performance of the Plea Agreement

Petitioner also argues that he is entitled to specific performance of the plea agreement that he entered with the state of Missouri regarding three counts of sodomy in October 1993. Under the plea bargain, petitioner was sentenced to ten years imprisonment in the Missouri Department of Corrections. Immediately prior to his release, proceedings were initiated by the State against the petitioner in order to have him civilly committed pursuant to the SVPA. Petitioner is therefore not in custody pursuant to the plea agreement, but rather on account of subsequent proceedings that followed the expiration of his sentence served in the Missouri Department of Corrections.

Courts have a duty to advise defendants pleading guilty of only the direct consequences of a guilty plea. See Brady v. United States, 397 U.S. 742, 755 (1970); George v. Black, 732 F.2d 108, 110 (8th Cir. 1984). Courts do not have a duty to disclose to defendants all indirect or collateral consequences that may arise from a guilty plea. See United States v. Lambros, 544 F.2d 962, 966 (8th Cir. 1976). The distinction

between "direct" and "collateral" consequences of a guilty plea turns on "whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Id. Jones's subsequent civil commitment as a sexually violent predator was a separate state procedure which was not immediate, nor automatically triggered by his initial plea. Therefore, this ground also fails on the merits.

Jury Instruction No. 8

Finally, petitioner argues that the trial court violated his constitutional rights by failing to accurately instruct the jury in one of its instructions. In particular, Jones argues that the instruction should have included information about the length of his commitment. This argument was raised on direct appeal. (Doc. 16 at 18-29.) On appeal, the Missouri Court of Appeals found the trial court's jury instruction followed the language of the statute, and was therefore proper. (Id. at 6.)

In Instruction No. 8, the trial court told the jury,
If you find the Respondent to be a sexually violent predator,
the Respondent shall be committed to the custody of the
director of the Department of Mental Health for care -- excuse
me -- for control, care, and treatment.

(Doc. 10, Ex. A at 478.)

The formulation of jury instructions generally concerns the application and interpretation of state law. Louisell v. Dir. of Iowa Dep't of Corrs., 178 F.3d 1019, 1022 (8th Cir. 1999). However, habeas corpus relief may be granted if an erroneous jury instruction constituted a fundamental defect, which resulted "in a complete miscarriage of justice, or an omission inconsistent with rudimentary demands of a fair trial." Id.

In this case, Instruction No. 8 was not misleading or erroneous. In fact, the instruction is taken, nearly verbatim, from the SVPA. See Mo. Rev. Stat. § 632.492. The SVPA commands that, "[i]f the trial is held before a jury, the judge shall instruct the jury that if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental

health for control, care and treatment." Id. In another case, the Missouri Court of Appeals approved the use of a jury instruction with language identical to that of Instruction No. 8. In re Care and Treatment of Scates v. State, 134 S.W.3d 738, 741-42 (Mo. Ct. App. 2004). Instruction No. 8 did not constitute a fundamental defect. This claim fails on the merits.

III. CONCLUSION

For the reasons stated above,

IT IS HEREBY RECOMMENDED that the petition of Rickey Jones for a writ of habeas corpus be denied.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to file timely written objections may result in the waiver of the right to appeal issues of fact.

/S/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed on November 5, 2008.